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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 22.

EVELYN C. GARDNER,

Petitioner,

v.

PANAMA RAILROAD COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PANAMA RAILROAD COMPANY, a corporation,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN APPEAL NO. 13259 IN ADMIRALTY.

PETITIONER'S REPLY BRIEF.

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1. Laches.

Respondent's cases state that admiralty draws upon the analogy of the statute of limitations only in the absence of exceptional circumstances explaining or excusing the delay. The undisputed facts establish the exceptional circumstance of a supervening statutory amendment and this petitioner's diligence—she did everything she could have done to vindicate her rights by action. Nor is there any basis for the argument that the District Court exercised a justifiable "discretion".

(a) There was no factual basis for a conclusion that laches—lack of diligence—here existed.

(b) The District Court's opinion negatives "discretion", for it erroneously held that, regardless of circumstances, the mere passage of one year created a bar, stating unequivocally "no facts or circumstances in her favor can prevent the running of the statutory limitation of one year" (R. 23).

2. "Jurisdiction."

Abstract discussion as to whether the Tort Claims Act created a new cause of action against the United States or merely gave a remedy is irrelevant.* Here no question of a new cause of action can arise, as there has *always* been an actionable cause of action for torts committed by the Panama Railroad Company, a corporation.

The only effect here of the Tort Claims Act (until its amendment by Public Law 172) was to substitute for the remedy of direct action against the Company, a remedy against the United States, made exclusive as to "claims which are cognizable" against the United States (28 U. S. Code 2679). The 1949 amendment simply removed this bar to the enforcement of the pre-existing remedy, by making such claims no longer "cognizable" against the United States.

Respondent concedes that Congress had no intention to destroy all rights of persons injured in the meanwhile "in view of the legislative purpose of Public Law 172" (Respondent's brief, p. 19), but insists that

* This Court has recently held that it merely was intended to provide a remedy. *Feres* v. *United States*, 340 U. S. 135, 140, 141 (1950). See also *Wilise* v. *United States*, 74 F. Supp. 786, 787; *Kendrick* v. *United States*, 82 F. Supp. 430, 432.

this unfortunate result is compelled in order to avoid "retroactivity". Actually no problem of retroactivity is involved; there is only a question of effectuating the Congressional intent that its instrumentality shall continue subject to suit.

As stated by Minton, *J.*, in *Standard Accident Insurance Co.* v. *Miller*, 170 F. 2d 495, 498 (C. C. A. 7, 1948):

> "the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied, although the statute does not, in terms, so direct, unless to do so would impair some vested right, or violate some constitutional guaranty."

In *Connett* v. *City of Jerseyville*, 96 F. 2d 392, 400 (C. C. A. 7, 1938), defendant contended that a statutory amendment, which withdrew previous remedies, should not be given retrospective effect as to the new remedies provided. The Court overruled this contention, and, after pointing out that "a curative or remedial enactment which merely affects the remedy or procedure will be given a retroactive effect", continued (Sparks, *J.*):

> "It would be unfair to the legislature to assume that it intended to strike down the remedy provided in the original Act, with no saving clause, without extending the relief afforded by the amendment to the existing certificate holders. There is no apparent reason why this should be done. To do so would be utterly inconsistent

with the expressed intention of the legislature * * *."

So here, respondent's contention not only disregards the established Congressional policy of liability for torts of government corporations even when there is no statutory provision (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381), but would completely subvert the expressed purpose of Public Law 172 to "continue unimpaired * * * the amenability of the Company to suit in the ordinary course" (U. S. Code Congressional Service, 81st Congress, 1st Session 1949, vol. 2, pp. 1589-1593).

CONCLUSION.

The judgment of the Courts below should be reversed with costs, and the case remanded for trial on the merits.

Respectfully submitted,

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